Malacca Securities Sdn Bhd v Loke Yu

HIGH COURT (MELAKA) — SUIT NO 22–54 OF 1997
LOW HOP BING J
17 JANUARY 2002

Civil Procedure *— Amendment — Order — Consent order — Whether court could amend its order after order was perfected and extracted — Whether court was functus officio — Whether slip rule in O 28 r 11 Rules of the High Court 1980 applied*

The plaintiff in this case applied to the court in encl 28 for leave to amend the consent order dated 17 January 2001 by adding, inter alia, that should the defendant default in complying with any of the terms of the consent order, the plaintiff was entitled to the whole amount claimed in the action that is, inter alia, the amount of RM3,509,323.29 with interest thereon and costs. Learned counsel for the plaintiff stressed that the application for leave to amend was intended to include the amount as stated in the plaintiff's claim. Learned counsel for the defendant raised two grounds in objection, ie that the consent order had been perfected and extracted and thus the court was functus officio; and the amendment would prejudice the defendant.

Held, allowing the plaintiff's application and making an order in terms in encl 28:

(1) There was nothing on the facts and the law to preclude the plaintiff from obtaining leave to amend, as the plaintiff was merely seeking to expressly and explicitly set out the plain and obvious intention of the parties herein and indeed the intention of the court as had hitherto been stated in the consent order (see p 510C).

(2) The court had no power under any application in the same action to alter or vary an order after it was drawn up except that it may do so under the slip rule in O 20 r 11 of the Rules of the High Court 1980, so far as was necessary to correct errors in expressing the intention of the court (see p 511B–C); *Hock Hua Bank Bhd v Sahari bin Murid* [1981] 1 MLJ 143 followed. The slip rule had long been recognized and invoked in cases where the justice of the case appeared necessary and advisable and even considerable delay in making the application under the slip rule would not prevent the court from making an order that a judgment be corrected by including an order for the payment of interest on a judgment sum (see p 511C, 512A–B); *Tak Ming Co Ltd v Yee Sang Metal Supplies Co* [1973] 1 WLR 300 followed.

(3) The principle of functus officio could not in any way defeat the inherent jurisdiction of the court to do justice in a particular case (see p 512C); *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd*[1998] 1 MLJ 393 followed.

(4) The various issues raised for the defendant, viz the non-application of the slip rule, the application of the doctrine of functus officio and the alleged prejudice to the defendant were utterly unmeritorious and could not be legally upheld (see p 512E–F).

[Bahasa Malaysia summary

Plaintif dalam kes ini telah memohon kepada mahkamah dalam lampiran 28 untuk kebenaran meminda perintah persetujuan bertarikh 17 Januari 2001 dengan menambah, antara lain, bahawa sekiranya defendan gagal mematuhi mana-mana terma perintah persetujuan tersebut, plaintif berhak mendapat jumlah keseluruhan yang dituntut dalam tindakan iaitu, antara lain, jumlah RM3,509,323.29 berserta faedah dan kos. Peguam yang arif bagi pihak plaintif menegaskan bahawa permohonan untuk kebenaran membuat pindaan tersebut adalah bertujuan untuk memasukkan jumlah tersebut sebagai mana yang dinyatakan dalam tuntutan plaintif. Peguam yang arif bagi pihak defendan telah menimbulkan dua alasan bantahan, iaitu bahawa perintah persetujuan tersebut telah disempurnakan dan dikeluarkan dan oleh itu mahkamah adalah functus officio, dan pindaan tersebut akan memprejudiskan defendan.

Diputuskan, membenarkan permohonan plaintif dan membuat satu perintah seperti dipohon dalam lampiran 28:

(1) Tiada apa-apa berdasarkan fakta dan undang-undang untuk menghalang plaintif daripada mendapat kebenaran untuk membuat pindaan, kerana plaintif hanya memohon untuk menyatakan secara nyata dan eksplisit tujuan yang jelas dan nyata pihak-pihak terlibat dan sememangnya tujuan mahkamah telahpun dinyatakan dalam perintah persetujuan tersebut (lihat ms 510C).

(2) Mahkamah tidak mempunyai kuasa di bawah mana-mana permohonan dalam tindakan yang sama untuk mengubah atau meminda satu perintah setelah ia dibuat kecuali jika ia dibuat di bawah kaedah kesilapan dalam A 20 k 11 Kaedah-Kaedah Mahkamah Tinggi 1980, setakat mana yang perlu untuk membetulkan kesilapan dalam menyatakan tujuan mahkamah (lihat ms 511B–C); *Hock Hua Bank Bhd v Sahari bin Murid* [1981] 1 MLJ 143 diikut. Kaedah kesilapan telah lama diakui dan digunakan dalam kes-kes di mana keadilan kes dilihat perlu dan wajar dan kelewatan yang lama dalam membuat permohonan di bawah kaedah kesilapan tidak akan menghalang mahkamah daripada membuat satu perintah, bagi satu penghakiman yang disempurnakan, dengan memasukkan satu perintah untuk pembayaran faedah atas jumlah penghakiman tersebut (lihat ms 511C, 512A–B); *Tak Ming Co Ltd v Yee Sang Metal Supplies Co* [1973] 1 WLR 300 diikut.

(3) Prinsip functus officio tidak mungkin dalam apa carapun menggagalkan bidang kuasa sedia ada mahkamah untuk melakukan keadilan dalam suatu kes tertentu (lihat ms 512C); *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393 diikut.

(4) Pelbagai persoalan yang ditimbulkan bagi pihak defendan, iaitu keadah kesilapan tidak terpakai, pemakaian doktrin functus officio dan prejudis terhadap defendan, adalah tidak wajar dan tidak mungkin dikekalkan di sisi undang-undang (lihat ms 512E–F).]

[*Editorial Note*: The defendant had appealed to the Court of Appeal vide Civil Appeal No M–02–88 of 2002.]

Notes

For cases on amendment of order, see 2(1) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 467–469.

Cases referred to

Arab-Malaysia Finance Bhd v Malacca Development Corp Sdn Bhd & Ors [1997] 5 MLJ 685 (refd)

Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393 (folld)

Hession v Jones [1914] 2 KB 421 (refd)

Hock Hua Bank Bhd v Sahari bin Murid [1981] 1 MLJ 143 (folld)

Kelsey v Doune [1912] 2 KB 482 (refd)

Malaysian International Merchant Bankers Bhd v Dhanoa Sdn Bhd [1988] 1 MLJ 257 (refd)

Mutual Shipping Corp of New York v Bayshore Shipping Co of Monrovia; The Montan [1985] 1 All ER 520 (refd)

Oriental Bank Bhd v Syarikat Zahidi Sdn Bhd [1998] 2 MLJ 81 (refd)

St Nazaire Co, Re 12 Ch D 88 (refd)

Standard Chartered Bank (M) Bhd v Benjamin a/l KRK Samy & Anor [2002] 1 CLJ 171 (refd)

Tak Ming Co Ltd v Yee Sang Metal Supplies Co [1973] 1 WLR 300 (folld)

Legislation referred to

Arbitration Act 1950 [UK] s 22(1)

Rules of the High Court 1980 O 20 r 11

Rules of the Supreme Court 1957 O 28 r 11

Eng Tiong Mei (*Jal & Lim*) for the plaintiff.

Tieh Siaw Siong (*Paul Ong & Associates*) for the defendants.

Low Hop Bing J:

Application

This is the plaintiff's application in encl 28 for an order that the plaintiff be granted leave to amend the consent order dated 17 January 2001 ('the consent order') by adding to the final paragraph thereof to read as follows:

> DAN AKHIRNYA DENGAN PERSETUJUAN BAHAWA sekiranya defendan, Loke Yu, ingkar mematuhi mana-mana terma seperti yang dinyatakan di atas, plaintif, Malacca Securities Sdn Bhd, berhak menuntut ke atas keseluruhan jumlah yang dituntut di dalam tindakan ini, iaitu:
>
> (i) jumlah sebanyak RM3,509,323.29;
>
> (ii) faedah pada kadar 13% setahun atas jumlah RM3,509,323.29 yang berjumlah RM12,508.40 dikira sehingga 8 April 1997 dan faedah berterusan hingga tarikh penyelesaian dan bayaran penuh; dan
>
> (iii) kos.
>
> (Translation:
>
> AND FINALLY BY CONSENT THAT should the defendant, Loke Yu, default in complying with any of the terms as aforesaid, the plaintiff, Malacca Securities Sdn Bhd, is entitled to the whole amount claimed in this action, that is:
>
> (i) the amount of RM3,509,323.29;
>
> (ii) interest at 13%pa on the amount of RM3,509,323.29 amounting to RM12,508.40 computed until 8 April 1997 and continuing interest until the date of full settlement and realization; and
>
> (iii) costs.)

Submission for plaintiff

The principal ground for this application is that it is essential to reflect the true situation, whereby the defendant is not prejudiced. In her submission, in support of this application, Ms TM Eng, learned counsel for the plaintiff, stressed that the application for leave to amend was intended to include the amount as stated in the plaintiff's statement of claim.

Objection by defendant

Mr SS Tieh, learned counsel for the defendant, in objecting to the plaintiff's application, raised two grounds, viz that the consent order has been perfected and extracted from the court and so no amendment may be allowed as the court is functus officio. According to him, it is not a clerical slip or omission. Secondly, he contended that at the time the consent order was recorded, the defendant has agreed to pay RM200,000 only and so the amendment, if allowed, would prejudice the defendant.

Decision of the court

The crucial words in the consent order are 'keseluruhan jumlah yang dituntut di dalam tindakan ini', ie 'the whole amount claimed in this

action'. This matter before me is therefore simple and straightforward. The consent order is as clear as crystal in that the defendant has consented to pay RM200,000 by way of four yearly instalments, commencing 17 March 2001, and that in the event of the defendant's default in the payment of any of the aforesaid instalments, the whole amount claimed in this action shall become due and payable. This 'default clause' has been expressly stated in the consent order which has been perfected and extracted after the respective learned counsel had very carefully and meticulously vetted and approved.

There is now a default by the defendant in the payment of the very first instalment, in which event the consent order sanctions that the whole sum claimed by the plaintiff shall become due and payable. What the plaintiff has sought to amend is to particularize the plain and obvious, ie to repeat or parrot the prayers in para 8 of the plaintiff's claim. In my considered opinion, there is nothing on the facts and the law to preclude the plaintiff from obtaining leave to amend, as the plaintiff is merely seeking to expressly and explicitly set out the plain and obvious intention of the parties herein and indeed the intention of the court as has hitherto been stated in the consent order.

In *Standard Chartered Bank (M) Bhd v Benjamin a/l KRK Samy & Anor* [2002] 1 CLJ 171, the facts of the case are as follows:

> The defendants have vide perserahan (presentation) No 16221/94 Jilid 31 Folio 20 charged their property, held under HS(D) No 20197, PT No 13106, Mukim Kajang, together with a bungalow house erected thereon, to the plaintiff as security for banking and financial facilities viz term loan and overdraft facilities.
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> As a result of the defendants' default, as at 5 November 1996, the term loan fell into arrears of RM243,080.74, while the overdraft facility showed an outstanding sum of RM1,199,235.23 on 31 October 1996. Plaintiff has duly issued statutory notice in Form 16D of the National Land Code 1965 to the defendants demanding payments therefor. However, at the hearing of the originating summons, the plaintiff has wrongly stated the sum of RM312,239.93 as the amount outstanding and so the order for sale made thereon also reflected the outstanding sum of RM312,239.93.
>
> The plaintiff was unaware of the error until 13 September 2000, when the plaintiff's solicitors received the bailiff's statement which showed that the said property was sold for RM1,052,500. The plaintiff's error arose in the plaintiff's second affidavit in support of the said originating summons, whereas the said Form 16D stated the sum of RM302,236.63 as outstanding term loan as at 29 June 1998, while the sum of RM1,483,968.15 was reflected as the outstanding sum in the overdraft facility.
>
> Interest was agreed at 16.3% per annum on a daily basis from 30 June 1998, ie at RM662.70 per day until full and final realization.
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> On the basis of the aforesaid error, the plaintiff prays for an order to effect the amendment.
>
> I allowed the plaintiff's application for amendment by deleting the amount RM312,239.93 and substituting therefor the amount RM1,786,204.78.

A The fundamental provision which calls for judicial interpretation in *Standard Chartered Bank (M) Bhd*, as in the instant case, is contained in O 20 r 11 of the Rules of the High Court 1980 ('the RHC') which is reproduced as follows:

> Amendment of judgment and orders
>
> B Clerical mistakes in judgments or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court by summons without an appeal.

The Federal Court in *Hock Hua Bank Bhd v Sahari bin Murid* [1981] 1 MLJ 143, after stating the general rule that the court has no power under any C application in the same action to eg alter or vary an order after it is drawn up, added that exceptionally it may do so under the slip rule in O 28 r 11 of the Rules of the Supreme Court 1957 (O 20 r 11 of the RHC) so far as is necessary to correct errors in expressing the intention of the court: per Chang Min Tat FJ (as he then was), referring to *Re St Nazaire Co* 12 Ch D 88; *Kelsey v Doune* [1912] 2 KB 482 and *Hession v Jones* [1914] 2 KB 421.

D The slip rule has long been recognized and invoked in cases where the justice of the case appears necessary and advisable. Hence, in *Mutual Shipping Corp of New York v Bayshore Shipping Co of Monrovia; The Montan* [1985] 1 All ER 520, the arbitrator had acknowledged his mistake in his award as to the actual fuel consumption, and the charterers applied to the E court for an order that the award be remitted to the arbitrator under s 22(1) of the Arbitration Act 1950 [UK] so that he could correct the error. The Court of Appeal held that although the said s 22 did not enable the arbitrator to correct errors of judgment, it provided the ultimate safeguard to prevent injustice by giving the court a wide power to remit an award to the arbitrator where he had made either a clerical mistake or an error arising F from an accidental slip or omission.

In *Malaysian International Merchant Bankers Bhd v Dhanoa Sdn Bhd* [1988] 1 MLJ 257, the order for sale of the charged lands did not fix a reserve price. The Supreme Court through the judgment of George Seah SCJ (as he then was) held that this may be remedied by a subsequent G application under O 20 r 11 of the RHC.

In *Arab-Malaysia Finance Bhd v Malacca Development Corp Sdn Bhd & Ors* [1997] 5 MLJ 685 at p 700 Augustine Paul JC (now J) observed as follows:

> It is settled law that after a judgment or order has been perfected, amendments H may only be made to it in relation to clerical errors, accidental slips and omissions as provided by O 20 r 11 of the RHC (see *Khoo Cheng Tat v Lim Soon Teik & Anor* [1982] 1 MLJ 289; *Tak Ming Co Ltd v Yee Sang Metal Supplies Co* [1973] 1 WLR 300; *Hock Hua Bank Bhd v Sahari bin Murid* [1981] 1 MLJ 143). However, the court has an inherent power to correct errors to give a clear expression to its intentions in the judgment or order I which has been perfected (see *Pearlman (Veneers) SA (Pty) Ltd v Bernhand Bartels* [1954] 1 WLR 1457). Such a power exists to enable the court to correct the record to make it consistent with the judgment or order which it obviously meant to pronounce (see *Hotel Ambassador (M) Sdn Bhd v Seapower*

(M) Sdn Bhd [1991] 1 MLJ 221; *Hatten v Harris* [1892] AC 560; *Koperasi Perumahan Kotawira Bhd v Kadir bin Kassim & Ors* [1991] 2 CLJ 1529).

In *Oriental Bank Bhd v Syarikat Zahidi Sdn Bhd* [1998] 2 MLJ 81, the plaintiff failed to ask for a specific date on which the auction ought to have been held pursuant to an order for sale. Kamalanathan Ratnam, J held that the said order may be corrected under the slip rule or the inherent jurisdiction of the court.

Even considerable delay in making the application under the 'slip rule' would not prevent the court from making an order that a judgment be corrected by including an order for the payment of interest on a judgment sum: *Tak Ming Co Ltd v Yee Sang Metal Supplies Co* [1973] 1 WLR 300 at pp 306–307.

The Federal Court in *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393, through the judgment of Mohd Azmi FCJ (as he then was) (with the concurrence of the then learned Chief Justice of the Federal Court Tun Eusoff Chin and Wan Adnan FCJ (later PCA)), towards the penultimate paragraph of the judgment, stated that the principle of functus officio could not in any way defeat the inherent jurisdiction of the court to do justice in a particular case. The learned fourth judge, Peh Swee Chin FCJ (as he then was) in addition to the recognition of the general rule, did acknowledge the exception, ie to amend an order or judgment under the slip rule as enacted in O 20 r 11 of the RHC. Gopal Sri Ram JCA, the learned fifth judge referred to the issue and application of the doctrine of functus officio which prevents a final order of the court being reopened, but did not jettison the exception, ie the power to amend a judgment or an order of the court under the slip rule.

Reverting to the respective submissions and the facts of this case as alluded to above, I find that the various issues raised for the defendant viz the non-application of the slip rule, the application of the doctrine of functus officio and the alleged prejudice to the defendant are utterly unmeritorious and cannot be legally upheld. In the circumstances, I allow the plaintiff's application and make an order in terms in encl 28, except that there shall be no order as to costs.

Plaintiff's application allowed and an order in terms in encl 28 made.

Reported by Chew Phye Aun